No. 17-12193-D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

MICHAEL S. FOSTER

Appellant / Petitioner

-Vs.-

UNITED STATES OF AMERICA

Appellee / Respondent

Appeal From The Final Decision Of The United States District Court For The Northern District Of Florida

APPELLANTS BRIEF IN REPLY TO APPELLEE 'S RESPONSE

(Fed. R. App. P. Rule 28.1)

Michael S. Foster, Fed. No. 06272-017

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Tucson, Az 85734-4550, In Re Pro - Se.

I. CERTIFICATE OF INTERESTED PERSONS

(Fed.R. App. P. Rule 32-2)

That Michael S. Foster, In Re Pro - Se , and Appellant, in this matter certifies, that in addition to persons listed, in Appellants Certificate Of Interested Persons, the following persons and entities may have interest in the outcome of this case.

Appeals Case: 17-12193

D.C. Case No. 3:05-CR-135

United States v. Michael S.Foster

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Collier, Lacy A.; Senior United States District Court Judge

Davies, Robert G; Sr. United States Justice

Eggers, Tiffany H.; A, United States Attorney

Kaufman, Chet; Formor Public Defender

Murrell, Randolph,; P. Federal Public Defemder

Timothy, Elizabeth, M.; US. Magistrate

Submitted By;

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ii. Table Of Contents

II. TABLE OF CONTENTS

ii. Table Of Contents (2)

IV. Arguments And Authorities (1)

IV. ARGUMENTS AND AUTHORITIES

Reply Issue One;

THE APPELLEE FAILED TO ARGUE, ISSUES ADDRESSED TO THE COURT OF APPEALS, THEREFORE SHOULD BE DEEMED WAVED AND VACATE THE SENTENCE, REVERSE JUDGEMENT, VACATE SENTENCE, AND REMAND WITH INSTRUCTIONS TO CORRECT SENTENCE.

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a. Standard Of Review

That the Review for the improper use of Appellee argument as a vehicle for presenting new arguments, and abandoning the other, is De Novo, -see- [AAR, Inc v. Nunez, 408 Fed. Appx 828 830 (Fifth and Eleventh Cir. 2011)-],-quoting- [Cinel v. Connick, 15 F.3d 1338, 1345 (5th Cir. 2004)-].

IV. Arguments And Authorities (2)

b. Argument

That Michael S. Foster, the Appellant, in the case at bar, in the Opening Brief addressed several Issues; Two;

[i.], Whether Or Not The District Court First Established The Correct Guidelines Range, Then Finish The Sentence For Reasonableness, And If So Did The District Court error In Failing To Find The Correct Guidelines Level, Prior To Using The § 3553 Factor. Violating The Constitutional Rights Of The Petitioner?

Issue Three;

Whether Or Not The New Rule Of The Supreme Court Of the United States Makes The Courts Incorrect For Convicting The Petitioner To Multiple Convictions, In Violation Of The Whartons' Rule, Of Double Jeopardy, For The Multiplication Of Of The Same Sentence. And Because Of The New Rule Of Teague Makes The Challenge Available On Collateral Review That Was Not Previously Available?

IV. Arguments And Authorities (3)

Issue Four;

The District Court Committed Plain Error When It Imposed and Increased The Length Of A guidelines Recommendation Sentence To Enable The Offender To Complete A Treatment Program Or Otherwise Promote A Rehabilitation Goal In Violation Of The Fifth Amendment Due Process Of The U.S. Constitution. -see- { Opening Brief, Page vii. Statement Of Issues, as filed}.

That without the proper response in the arguments, the United States appears to have taken the position that the issue is addressed. The issue is deemed abandoned, regardless, and the simple passing of reference is not enough to ague in any response, the United States rather focused on the First argument addressed, this appeal, and which will be shown that the issue is without merit as to the use and reasons for dismissing the Appeal.

IV. Arguments And Authorities (4)

c. Conclusion

Because the issues have not been addressed or answered, Appellant moves because the issues are proven and argued being serious Constitutional Errors, and the Appellee agrees, by defaulting absence of Language. Foster Moves this Court to once again, to determine, That the Review for the improper use of Appellee argument as a vehicle for presenting new arguments, and abandoning the other, is De Novo, -see- [AAR, Inc v. Nunez, 408 Fed. Appx 828 830 (Fifth and Eleventh Cir. 2011)-],-quoting- [Cinel v. Connick, 15 F.3d 1338, 1345 (5th Cir. 2004)-]. And Vacate, Reverse, and Remand for correction of illegal sentence, and any other relief that this court deems Just.

IV. Arguments And Authorities (5)

Reply Issue Two.

THE APPELLANT DID NOT ARGUE ANY ISSUE FOR CONVICTION, ALL ARGUMENTS WERE CLEARLY ADDRESSED LIMITED TO SENTENCING.

The Closest thing that the Petitioner could come to in the reason why the United States refers to the claim that the Petitioner, challenged his conviction, which he has not. And at no time in this Claim did he ever claim that his conviction was incorrect, clearly the claims made, in ' Arguement III ', was that petitioner focused on the "Sentence not the Conviction", the claim is exclusively "Sentence". -see- { Opeaning Brief, Pg. 42, at "Issue / Arguement III }.

a. Standard

A reminder that the Fifth Amendment of the Constitution of the United States, protects against ... the Multiple Punishment for the same offence. -see- [Illinois v. Vatle, 477 US. 410, 415; 65 L.Ed2d 288 (1980)-];

IV. Arguements And Authorities (6)

-and see- [United States V. McGarty, 669 F.3d 1218, 1253-54 (5th and 11th Cir. 2012)-].

The Defense of the "Wharton's Rule", the circuit precedent, ruled that the commission of two (or more) at different times does not necessarily prove that the crimes were carried out pursuant to more than one agreement. -see- [United States v. Nyhuis, 8 F.3d 731, 736 (5th and 11th Cir. 1993)-]. (" a conspiracy is an unlawful agreement has as its object the commission of crimes, on different occasions, there is still but one conspiracy"), -see- [United States v. Marable, 578 F.2d 151, 153 (5th Cir. and 11th Cir. 1988)-]. And any indictment that forms the same course of action, for which he was both convicted and sentenced, applies, -see- [United States v. Bobb, 577 F.3d at 1372 (Fifth and Eleventh Cir. 2009)-]. -see also- (Opening Brief pg, 42 through 55).

IV. Arguements And Authorities (7)

B. Arguement

The issue is relevantly clear, the United States is attempting to bring in the Conviction, in order to salvage the argument. Foster, clearly is argueing the Sentencing at this level, the sentencing was a continuing offence, and the Court Sentenced the issue beyond the rules and the Constitution allowed.

The issue as it related to the Audita Querela, was discovered, after the expiration of the time for Habeas Corpus. Because the issue is a improper calculation of the sentence, and can be raised at any stage of the proceeding, the issue was raised, at the Habeas Corpus Level, when the calculation was discovered incorrect.

Again the Supreme Court in the [Welch {supra}] made cases in this regard available for review, because of the illegal sentencing. The Court did see the incorrect sentencing because they decided to sentence the issues in a group forum.

IV. Arguements And Authorities (8)

So as Audita Querela has uncovered, that what was once a good law, that being the excess conviction for one continuing offence, covered up by sentencing, now that the sentencing was miscalculated, and because the District Court incorrectly Miscalculated the sentence, before the 3553 could be decided, and because the calculation involved multiple sentences that were and remain Unconstitutional, the case must be remanded for presentencing only, not the plea.

C. Conclusion

Because the Courts sentence is in Jeopardy to the Double Counting in light to the Supreme Court Precedent, in Welch, and in the Constitution, as calculated, and effects the punishment made available to have corrected, by the Supreme court Of The United States, The Court should Vacate the sentence, Reverse the Judgement, and Remand for re-sentencing.

IV. Arguements And Authorities (9)

Reply Issue Three.

ISSUE IS NOT A UNTIMELY § 2255. AS THE ISSUE WAS NOT CREATED UNTIL 2017, OVER 10 YEARS LATER. CORRECTING WHAT WAS ONCE GOOD LAW, BUT IS NOW UNCONSTITUTIONAL.

A. Standard Of Review

Appellant Foster, ' Agrees ', that the closely identified Standard Of Review, should be found at; [United States v. Holt, 417 F.3d 1172, 1174 (Fifth and Eleventh Cir. 2005)-]. -see- { Appellee's Response Brief, Pg. 14}.

In this standard, again the United States tries to put whipped cream on there ding argument, hopefully to sale the issue to this Court. And uses so much false waving and distraction, and manipulation of th cases in hopes that that a ' Reasonable Jurist ', will just ignore the Circuit President, and grant what will be a Manifest Of Justice.

IV. Arguements and Authorities (10)

Meaning, and agreeing with the United States yet again, that the usual remedy for a Federal Prisoner seeking review of his [c]onviction, it is proper to first seek out the Habeas Corpus found at § 2255. Rather than other available post conviction remedies. -see- [Zelaya v. Sec. Fla. Dep't Of Corr. 798 F.3d 1360, 1365 (Fifth and Eleventh Cir. 2015)-].

Other Remedies meaning that Federal Courts, recognize common law postconviction remedies pursuant to the ' All Writs Act ', 28 U.S.C. § 1651. Pursuant to the Supreme Court decision found in [United States v. Morgan, 346 US. 502, 74 S. Ct. 247; 98 L.Ed 248 (1954)..But not in the Civil [suit] context. -see- [Holt, 417 F.3d at 1174 (Fifth and Eleventh Cir. 2005)-].

And when there is a legal objection that did not exist at the time of judgment, when it was entered. -see- [Holt, 417 F.3d at 1174 (Fifth and Eleventh Cir. 2005)-]; and many other circuits as well as the Fifth and the Eleventh (such as the Fourth, Seventh, Ninth, Tenth), have determined likewise that a Federal Prisoner may not use the Writ of Audita Quererla where relief is available, through a § 2255.

IV. Arguements and Authorities (11)

-see- [Holt, 417 F.3d at 1176 (Fifth and Eleventh Cir. 2005)-]; And it is also used to fill the gaps in system of post conviction remedies. -see- [Morales v. Fla Dept. OF Corr., 396 Fed. Appx. 539, 540 (Fifth and Eleventh Cir. 2009)-].

That basically the § 2255, is the first and primary means to attack collaterally the conviction and the sentence -see- Tolliver v. Dobre, 211 F.3d 876, 878 (Fifth and Eleventh Cir. 2000)-], And a § 2241 is only used for attacking errors that occur in trial or sentencing. In the use of the " Savings Clause ". -see- ; And may use the § 2241 if an otherwise available remedie under § 2255 is inadequate or ineffective. -see- Lee v. Vazquez, 266 Fed. Appx. 846 (Fifth and Eleventh Cir. 2008)-].

Another way a prisoner may otherwise use the § 2241, is when (1) the claim is based upon a retroactively applicable United States Supreme Court decision; (2) that establishes that the prisoner was convicted of a nonexistent offence; (3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255,

IV. Arguements and Authorities (12)

and all three issues are met, -see- [Lee v. Vazquez, 266 Fed. Appx. 846 (Fifth and Eleventh Cir. 2008)-]. A § 2241 may be granted in five other situations.

However, Holt, the preferred decision of the United States, found that in their case, that a previous § 2255 was previously filed. And because the request was then filed for another § 2255, but using the vehicle of the Writ Of Audita Querela, that it was in fact a Second and Successive § 2255, which is not permitted, A § 2241 may be granted in five situations, - see - [Holt, 417 F.3d at 1175 (Fifth and Eleventh Cir. 2005)-].

B. Argument

The United States has determined that, the filing is a Untimely and unreviewable, and therefore not qualified under Writ Of Audita Querela. -see- { Appellee Response Brief, pp. 18 }. But the AUSA also argues that when a ' Cognizable ' claim is available for Post Conviction Relief, dispute wether or not, a good ruling will become of the filing, the Appellant [must] file the brief regardless.

IV. Arguements and Authorities (13)

That in the world of the AUSA offices that ' eligible ', is tantamount to ' regardless '.

Meaning that if the issues, if normally timely, are cognizable, then if you are late, or failed to file, for what ever reason, even if the issue would be deemed frivolous, that the § 2255, must be used regardless, of the foreseablie results. -see- { Appellee Response Brief, pp. 15 - 16.

It should be noted that, the United States abandoned the issue found in Issue One. The District Court alleged that relief was available in § 2255 at (3)(and) (4). And Foster, notes that the argument found at Pg 14, in the { Appellant's Opening Brief, pp. 14}, made that simple argument. To The Default of the United States.

IV. Arguments and Authorities (14)

The Problem is, the Appellant filed the Petition, in the form that is permitted, by the Common Law, Writ of Audita Querela. As (1) The issue was [p]ost time limits for any Appeal, and Habeas Corpus Relief, (2) because it was post, and was not ruled by the Supreme Court to be Retroactive (3) and dealt with the Sentencing Calculations, found in a 2017 case; (4) that under the Supreme Court case, was made available in 2016 - 2017, (5) and it dealt with, a Sentence [only], that was once believed to be good law, but as ruled now was not good law. Is by definition ripe for Audita Querela.

It is not possible to file a § 2255 and declare a case in 2009, from the 2017, and it is nowhere incorrect for the Appellant, when he filed the Petition that he only sought out to have the Sentence Corrected based on the Supreme Court cases.

Foster, hereby Incorporated the entire brief, of the Appellant, as if fully included herein, pursuant to Rule 10 of the Fed.. R. Civ. P.

IV. Argument And Authorities (15)

a. Applicability Of § 2255

It is typical of the § 2255, that Motions made [a]fter the one year period, will typically be herd . -see- [Zelaya v. Sec., Fla. Dep't Of Corr., 798 F.3d 1360 (Fifth and Eleventh Cir. 2015)-]. Lates of " the date in which the judgement of conviction became final, (2) the date on which the impediment to making a motion created by governmental action in violation of Constitution or Laws of the United States is removed, if the movant was prevented from making a motion by such government action; (3) that the date on which the right asserted was initially recognized by the Supreme Court, and made retroactive, on collateral review.; (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Now although the United States 'dropped the ball' on this issue, the District Court dismissed the action because it (it being the Magistrate), claimed that the Foster, was able to use subsection either (f)(3), or (f) (4).

IV. Argument And Authorities (16)

However as argued in the { original Brief pp. 14 }, this was simply not true, and apparently well proved since the United States refused to Reply.

Either way the false claim that the Appellant Foster was " out of time ", to file this Habeas is so confusing because he did not file a § 2255, because it was unavailable. But at no time was it untimely.

The Supreme Court has already made ready for Collateral Review, that the incorrect application to the Sentencing Guidelines. -see- [Slack V. McDaniel, 529 US 473, 488; 146 L.Ed2d 542; 120 S. Ct. 1595 (2000)-]; -see also- [McCarthan v. Dir. of Goodwill Indus. - Suncoast, 851 F.3d 1076, 1097 (fifth And Eleventh 2017)-].

Having merit in this regards, in 2006 when the Appellant Foster was present in the Court. We did not believe that the Court was incorrectly accepting the recommendation of the Presentence Investigations, that on its face were incorrect.

IV. Argument And Authorities (17)

I mean with the thousands of cases before the Court the task was the United States Parole Office, to assist the Court. And they not the Judge in this part of the case dropped the ball.

That at sentencing in 2006, the Sentencing Guidelines in its infancy, was just beginning, so at that time it would be no surprise that the "kinks" were still being worked out. -see- [United States v. Booker, 543 US. 220; 125 S.Ct. 738; 160 L.Ed2d 621 (2005)-]. ("Changing from Mandatory To Advisory").

And then it was not until 2013 that the Supreme Court began clearing up the intent to the Sentencing guidelines, -see- [Alleyne v. United States, 570 U.S. __; 186 L.Ed2d 314; 133 S. Ct. 2151 (2013)-], where it directed the cases were not [by declaration by the Supreme Court made retroactive on collateral review], -see- [Santillana v. Uton, 846 F.3d 779, 782-783, (Fifth and Eleventh Cir. 2017)-].

IV. Argument And Authorities (18)

And because of the Retroactivity debate, the issue was not available. Then in 2016, while dealing with the [Johnson v. United States, 576 US. __; 192 L.ed2d 569; 135 S. Ct. 2551, (2015)-].; that the Supreme Court of the United States, assisted this type of Question by bringing [Welch v. United States 578 US. ; 136 S.Ct. 1257,; 194 L.ed2d 387 (2016)-].

Welch, created a added level of acceptance to consideration of cases and assisted Teague, in the evaluation of what could be considered Retroactive on collateral Review. - referring to - [Teague v. Lane, 489 US. 288; 109 S. Ct. 1060; 103 L.ed2d 334 (1989)-]. Welch made it clear that new procedures and substantive rules, would apply on collateral review. It had to change this in order for Welch to make it through the tunnel, as it was too big to fit.

In the change, came [Molina- Matinez v. United States, __ US. __; 194 L.Ed2d 444; 136. S.Ct. 1338 (2016)-], that started the issue of the Correct calculation. In the ruling it fostered the action that the Sentencing Guidelines must begin at the correct level, meaning both calculations, as well as the books doing the calculations.

IV. Argument And Authorities (19)

This is know to be true, because [Hurst V. Florida, 577 US. __; 193 L.Ed2d 504; 136. S.Ct. 616 (2015)-] (Instant Reversal), because of the same issue, see the series of reverses in this circuit of the same issue, -see- [Russel v. Alabama, 577 US. __; 136 S. Ct. 616; 193 L.Ed2d 504 (2016)-] - see also- Mathis v. United States, __ Us. __; 195 L.Ed2d 604; 136 S. Ct. 2243-];

The Supreme Court has made it clear there is an essential framework the Guidelines as established for sentencing proceedings, And the Guidelines are to be the starting point, the bench mark. -see- [Gali v. United States, 522 US. 38, 49; 128 S. Ct. 586; 169 L.Ed2d 455 (2007-].

Because the Court sentenced the Appellant using a multiple of mistakes, and because the issue was presented, in 2016. When the Supreme Court of the United States made the issue retroactive, pursuant with the application of the principal of Molina, and the Actual Innocence of Pugh, the application is clear.

C. CONCLUSION

That because the issue was not addressed in the Supreme Court until 2016 - 2017, and because the issue presents correcting an illegal sentence. And because the Appellant has shown that the § 2255 is unavailable, and because he also has shown that he argues that issue that was once right, but is now incorrect in regards to sentence. Challenge only to the sentence, not the conviction or the plea. Appellant moves this Court in a clear showing the Audita Querela is only available for such collateral proceedings, and further move this Court to vacate, the sentence, Remand for correction, and any other procedure the court deems just in this matter.

VI. Certificate Of Compliance (1)

VI. CERTIFICATE OF COMPLIANCE

That I, certify that this brief complies with F.R.A.P. Rule 32(a)(7)(B)(i)(ii). As as Reply Brief contains less than 600 actual lines of text.

That this document complies with the Typeface and Typestyle, as is monospaced. Pursuant to F.R.A.P. Rule 32 (a)(5), and the Type-style requirements F.R.A.P. 32 (a)(6).

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Permission To File Brief Page .

Certificate Of Service / Declaration

CERTIFICATE AND DECLARATION OF SERVICE

I, hereby state that the above and foregoing was placed in the United States Postal Service, Postage Pre-Paid, to the following on this 9th date of November 2017. By Placeing the article in the hands of a U.S. Prison Employee, who inspected the article to be mailed, then placed Indigent postage on the envelope, then delivered the article to be mailed to a U.S. Postal Carrier, with a copy being generated to the following, pursuant to the Prison Mail Box Rule, of Houston v. Lack, 487 US. 266 (1988), -see also [Coley V. Perry, 2017 US. App. LEXIS 9552 (4th Cir. 2017)-].

Mr. Christopher P. Canova, and Nancy Hess, United States Attorney Office, District Of Florida. 21 East Garden Street, Suite 300 Pensacola Florida 32501.

Mailed by

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